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Supreme Court, U.S.
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No. 95-1378

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

J. RICHARD FURRER and MARGARET L. FURRER,
Petitioners,

v.

DONALD F. BROWN, DOROTHY J. BROWN, LOUIS W. FAGAS, GERALDINE J. FAGAS, and SHELL OIL COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT SHELL OIL COMPANY'S MEMORANDUM IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether § 7002(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a), grants district courts subject matter jurisdiction to adjudicate a cause of action by a private citizen for a monetary judgment for the recovery of past cleanup costs for remediating contamination.

2. Whether a plaintiff must allege that an extant waste may present an imminent and substantial endangerment to health or the environment to state a claim under § 7002(a)(1)(B) of the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B).

RULE 29.6 STATEMENT

Consistent with Rule 29.6 of the Rules of the Supreme Court of the United States, Shell Oil Company states that its parent corporation is Shell Petroleum Inc., whose shares are directly or indirectly owned 60 percent by Royal Dutch Petroleum Company, The Hague, The Netherlands, and 40 percent by The "Shell" Transport and Trading Company, public limited company, London, England.

Shell Oil Company states further that its nonwholly owned subsidiaries are: Saudi Petrochemical Company, CRI International, Inc., CRI Catalyst Company, CRI Europe S.A., CRI Fine Chemicals Inc., CRI Investment Corporation, CRI Asia Pacific Holdings Inc., CRI Asia Pacific Private Limited, CRI Catalyst Company Europe Limited, CRI Catalyst Company Belgium N.V., CRI Catalyst Company U.K. Limited, CRI Europe S.A., Catalyst Recovery Europe S.A., Catalyst Technology Europe S.A., Catalyst Technology GmbH, CRI Real Estate, Inc., CRI-SAM, Ltd., CRI Sales and Services Inc., CRI Zeolites Inc., Catalyst Recovery of Louisiana, Inc. Catalyst Technology, Inc., Catalyst Technology Services Inc., Catalyst Recovery Canada Ltd., CRI Metal Products, Inc., Shell Consolidated Energy Resources Inc., Shell Frontier Services Inc., Shell Land & Energy Company, Coral Energy Resources Services Company, Pecten Cameroon Company, Pecten Export Corporation Ltd., Pecten do Brasil Servicos de Petroleio, Ltda., Taranaki Offshore Petroleum Company Limited, Cortez Capital Corporation, Shell LSO Property Company, Premix/E.M.S. Inc., Butte Pipe Line Company, Dixie Pipeline Company, Explorer Pipeline Company, Locap, Inc., Plantation Pipe Line Company, West Shore Pipe Line Company, Wolverine Pipe Line Company, Coral Energy Resources, L.P., Coral Norstar L.L.C., Coral Power L.L.C., Coral Gas Marketing Company, Shell Oil & Gas Investment Limited Partnership, and Norstar Energy Limited Partnership.

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Petitioners filed a Complaint against Shell Oil Company ("Shell") under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972 (1988 ed.). Petitioners sought to recover past costs for cleaning up soil contamination on their property.

The United States District Court for the Eastern District of Missouri held that it did not have subject matter jurisdiction over Petitioners' request for past cleanup costs. Furrer App. 28. The court reasoned that 42 U.S.C. § 6972(a)(1)(B) does not provide jurisdiction for suits

for " 'restitution' to recover costs associated with remediating petroleum contamination . . . ." *Id.* As an alternative ground for its holding, the District Court stated:

> [I]n order to prevail on their claim under RCRA, the plaintiffs must plead and prove that the leaking petroleum presents "an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Plaintiffs make no such allegation here. Further, as the plaintiffs have completely cured the contamination at issue in this case it will be impossible for them to prove that the petroleum contamination currently presents an imminent and substantial endangerment to the health or the environment.

Id.

The United States Court of Appeals for the Eighth Circuit affirmed the District Court's Judgment. Furrer App. 1. The Court held that "§ 6972 on its face does not provide for the recovery of remediation costs by way of a citizen suit." *Id.* at 5. The Court of Appeals did not reach the alternative ground of the District Court's holding under 42 U.S.C. § 6972(a)(1)(B) that Petitioners did not and could not allege a present "imminent and substantial endangerment to health or the environment." *Id.* at 5 n.6.

On March 19, 1996, this Court decided *Meghrig v. KFC Western, Inc.*, No. 95-83, 1996 U.S. LEXIS 1955. The Court held that "Section 6972(a) does not contemplate the award of past cleanup costs, and § 6972(a)(1)(B) permits a private party to bring suit only upon an allegation that the contaminated site presently poses an 'imminent and substantial endangerment to health or the environment,' and not upon an allegation that it posed such an endangerment at some time in the past." 1996 U.S. LEXIS 1955, at *16.

Based upon *Meghrig*, this Court should deny the Furrers' Petition. The Court's holding that the citizen suit

provision of RCRA does not permit one to recover past cleanup costs implicitly approves of the Eighth Circuit's identical holding in this case. Furthermore, the Court's holding that one must allege a present "imminent and substantial endangerment to health or the environment" to bring suit under § 6972(a)(1)(B) implicitly approves of the District Court's identical holding in this case and therefore constitutes an alternative ground to support the Eighth Circuit's opinion.

Meghrig ends the conflict between the Ninth and Eighth Circuits, establishes binding authority on the lower courts consistent with the Eighth Circuit's and District Court's opinions, and thus eliminates any basis for granting the Furrers' Petition. *See* Sup. Ct. R. 10.

CONCLUSION

For these reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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March 25, 1996